Supreme Court, U.S.
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No. 10-468

In The Supreme Court of the United States

TRANSCOR AMERICA, LLC, et al.,

Petitioners,

v.

KEVIN M. SCHILLING, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the court of appeals abuse its discretion in denying Petitioners' petition to appeal pursuant to Federal Rules of Civil Procedure, Rule 23(f)?

a. Did the court of appeals abuse its discretion in denying interlocutory review of the district court's interpretation of the Prison Litigation Reform Act's physical injury requirement, 42 U.S.C. § 1997e(e)?

b. Did the court of appeals abuse its discretion in denying interlocutory review of the district court's finding that class issues predominate over individual issues in this case?

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STATEMENT OF THE CASE

On February 8, 2008, Respondent Kevin Schilling filed a class action complaint alleging that his constitutional rights, and the rights of others similarly situated, had been violated by the policies and practices of Petitioner TransCor America, LLC ("TransCor"), a private company that transports inmates on behalf of local, county, state, and federal agencies. Mr. Schilling alleged that when TransCor transported him and other inmates for more than 24 continuous hours locked in cages, restrained them in handcuffs, leg irons, belly chains, chains connecting them to one another, and black boxes immobilizing their wrists, denied them rest in a bed, allowed them only restricted access to a toilet, denied them access to sanitation facilities, and fed them inadequate food, it deprived them of something sufficiently serious to violate the Eighth and Fourteenth Amendments to the United States Constitution. Mr. Schilling was a pretrial detainee at the time he was transported by TransCor. The class action complaint was subsequently amended to add two other named plaintiffs, John Pinedo and William Tellez, who were sentenced prisoners at the time they were transported by TransCor.

After conducting relevant discovery, Respondents moved for certification of the class. The district court granted Respondents' motion in part and denied it in part.

In its order, the district court considered and rejected Petitioners' argument that the class could

not be certified because the Prison Litigation Reform Act ("PLRA") requires a prior showing of physical injury, and the class might include prisoners who were not injured. Notably, Petitioners do not contest that each of the three named plaintiffs, Kevin Schilling, John Pinedo and William Tellez, made the showing required by the PLRA. Nor do they argue that the district court erred in concluding that the named plaintiffs' claims are typical of those of the class.[1]

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[1] Petitioners imply that there may be a substantial number of prisoners who did not suffer physical injuries, when there is no evidence to support this claim. Their sanitized version of the facts should not be allowed to mislead the Court.

For example, Petitioners minimize the effect of their restraints when applied for more than 24 continuous hours. Petitioners would have the Court believe that the restraints are removed or loosened when an inmate's limbs become swollen or numb or they suffer abrasions. In fact, restraints can only be modified when a TransCor extradition agent is given written permission to modify them by the home office, and TransCor's person most knowledgeable about such practices testified it is almost never given.

Petitioners also minimize the extent to which TransCor's policies and practices interfere with the inmates' basic human need to sleep. TransCor's policy is to advise inmates that "if you sleep, you sleep sitting up in your seat." Because transport vehicles do not have seatbelts, an inmate risks injury if he falls asleep and the vehicle makes a sudden stop.

Petitioners also misleadingly describe the chemical toilets Respondents were able to use only when accompanied by an extradition agent, and were forced to use while still in restraints and chained to one another, and which lack running water or any means of maintaining sanitation, as "bathrooms".

The district court also considered and rejected Petitioners' argument that the commonality/predominance requirement of Rule 23(b)(3) had not been met. The district court concluded that the predominant question in this case, which is shared by all class members, is "whether inmates who have been transported for more than 24 hours and who are not allowed to sleep overnight have been deprived of something 'sufficiently serious'" to violate the Eighth and Fourteenth Amendments. Petition, p. 22a.

The district court certified a class of:

> All pretrial detainees and prisoners who were transported by TransCor America, LLC, its agents and/or employees between February 14, 2006 and the present, and who were forced to remain in restraints in the transport vehicle for more than 24 hours without being allowed to sleep overnight in a bed. The class includes pretrial detainees and prisoners who were removed from one transport vehicle and placed directly onto another, without being housed overnight, whose combined trip lasted more than 24 hours. The class only includes those pretrial detainees and prisoners who were transported by TransCor on behalf of a state agency, and does not include pretrial detainees and prisoners who were transported on behalf of a federal agency.

Petition, p. 26a.

TransCor's records show that it filled 22,367 orders for the transportation of pretrial detainees and prisoners where at least one leg of the journey lasted for more than 24 hours between February 14, 2006 and the time the class certification motion was filed. Approximately 19,000 trips lasted 24 to 48 hours; 7700 lasted 48 to 72 hours; 1700 lasted 72 to 96 hours; 71 lasted 96 to 120 hours; and four lasted 120 to 143.75 continuous hours. These numbers include individual legs of trips only. Approximately one-third of the prisoners transported are represented more than once because they were transferred from one vehicle to another for an additional leg of more than 24 hours. TransCor has estimated that the total number of members of the proposed class is approximately 16,000.

Petitioners petitioned the court of appeals to permit an appeal from the district court's class certification order under Rule 23(f). The court of appeal denied their request. They then petitioned for rehearing *en banc*. That petition was denied as well. They now petition this Court for interlocutory review of the class certification order. To date, Petitioners have not moved the district court to reconsider or modify its order certifying the class.

REASONS FOR DENYING THE WRIT

I. INTRODUCTION

Petitioners' displeasure with the United States court of appeals' denial of their petition to appeal the district court's order certifying the class pursuant to Federal Rules of Civil Procedure, Rule 23(f), does not warrant this Court's review.

Rule 23(f) gives the courts of appeals "unfettered discretion" in deciding whether to grant or deny petitions for permission to appeal class certification orders. The Ninth Circuit has adopted standards for deciding whether to grant Rule 23(f) appeals. Petitioners have not shown that the court of appeals failed to comply with its standards in this case or that the court's standards misconstrue the Rule or materially conflict with the standards adopted by other courts of appeals.

The district court's class certification order was consistent with both the PLRA and Rule 23(b)(3). Petitioners concede that the named plaintiffs, who "brought" this suit (*see* 42 U.S.C. § 1997e(e)), meet the PLRA requirements, establishing that the suit is not frivolous. Allowing the class to include prisoners who may not have suffered physical injury does not detract from the statute's goal of filtering out frivolous actions. Nor is such a ruling in conflict with the ruling of any other court that has ruled on the issue, as a close reading of Petitioners' authorities reveals.

The district court's application of Rule 23(b)(3)'s predominance requirement also withstands scrutiny. Respondents challenge Petitioners' system-wide policies and practices for transporting inmates, providing a more than adequate basis for class certification under Rule 23(b)(3). The district court identified specific fact and legal questions that are common to all class members and predominate over individual issues. The court's ruling is not in conflict with that of any other court as, once again, a close reading of Petitioners' authorities reveals.

Petitioners do not argue that the court of appeals' denial of their petition to appeal under Rule 23(f) "has decided an important question of federal law that has not been but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c). Nor do they argue that the Ninth Circuit order "conflicts with the decision of another circuit on the same important matter." Supreme Court Rule 10(a). Petitioners' failure to make these showings compels denial of their Petition for A Writ of Certiorari ("Petition").

For all the reasons stated herein, the Petition should be denied.

II. THE QUESTIONS PRESENTED BY PETITIONERS ARE NOT PROPERLY BEFORE THE COURT

The Petition was triggered by the court of appeals' denial of Petitioners' petition for permission to file an appeal pursuant to Federal Rules of Civil Procedure, Rule 23(f).[2] Petitioners' "Questions Presented" purport to challenge the district court's order certifying the class, but the actual question presented is whether the court of appeals abused its discretion in denying Petitioners' petition to appeal pursuant to Rule 23(f).

The Petition provides no compelling reason for the Court to conclude that the court of appeals abused its discretion. *See* Supreme Court Rule 10. It does not address the application of Rule 23(f). It does not address the standards adopted by the Ninth Circuit for implementing Rule 23(f). And it does not show a conflict between the Ninth Circuit's standards and those adopted by other courts.

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[2] Federal Rules of Civil Procedure, Rule 23(f), states:

> **(f) Appeals.** A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Fed. R. Civ. P. 23(f).

The Committee Notes accompanying the 1998 Amendments to Rule 23, which added Rule 23(f), give the courts of appeals the broadest possible discretion to grant or deny an interlocutory appeal of a class certification order. They provide that "[a]ppeal from an order granting or denying class certification is permitted in the *sole discretion* of the court of appeals. . . . The court of appeals is given *unfettered discretion* whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari. . . . Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive." Fed. R. Civ. P. 23, Committee Notes, 1998 Amendments (emphasis added).

The Committee anticipated that "the circuit courts will develop standards for granting review that reflect the changing areas of uncertainty in class litigation." Fed. R. Civ. P. 23, 1998 Amendments. And, in *Chamberlan v. Ford Motor Company*, 402 F.3d 952 (9th Cir. 2005), the Ninth Circuit did just that. *Chamberlan v. Ford Motor Company*, 402 F.3d at 959. The court of appeals found that, ordinarily, Rule 23(f) review is warranted only if: "(1) there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable; (2) the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade

end-of-the-case review; or (3) the district court's class certification decision is manifestly erroneous." *Id.*

Chamberlan illustrates that the Ninth Circuit will grant permission to appeal under Rule 23(f) in an appropriate case. *Chamberlan v. Ford Motor Co.*, 402 F.3d 952. In that case, the court of appeals granted the defendants' petition for Rule 23(f) review, and class certification was affirmed. *See also Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 939 (9th Cir. 2009) (interlocutory appeal permitted; denial of class action certification affirmed); *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 659 (9th Cir. 2004) (permission to appeal granted; denial of class certification affirmed). Petitioners simply failed to show the court of appeals that this is an appropriate case. They did not argue that this is a "death-knell" situation. They did not explain why the rulings they challenge are likely to evade end-of-the-case review. And they did not present a convincing case that the district court's class certification decision was manifestly erroneous.

If Petitioners are unhappy with the definition of the class, they are free to move the district court to modify it, or to reconsider its order. *See* Fed. R. Civ. P. 23(d). Appeal is premature. In this case, where discovery is still open, as in *Shin v. Cobb County Bd. of Education*, 248 F.3d 1061 (11th Cir. 2001), the scope and contour of the class may change radically as discovery progresses and more information is gathered about the nature of the putative class members' claims. *Shin v. Cobb County Bd. of Education*, 248

F.3d at 1064. "Because the district court retains the ability, and perhaps even a duty, to alter or amend a certification decision, a motion for reconsideration of a class certification order is a better way to correct any errors in the certification order or to recognize the importance of new facts." *Id. See also Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000) ("We should err, if at all, on the side of allowing the district court an opportunity to fine-tune its class certification order rather than opening the door too widely to interlocutory appellate review.").

For all the foregoing reasons, the Petition should be denied.

III. THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN DENYING REVIEW OF THE DISTRICT COURT'S INTERPRETATION OF THE PLRA'S PHYSICAL INJURY REQUIREMENT

The court of appeals did not abuse its discretion in denying Petitioners' petition to appeal the district court's interpretation of the Prison Litigation Reform Act's physical injury requirement. *See* 42 U.S.C. § 1997e(e). The district court's interpretation of the PLRA is in accord with both the Act's plain language and the legislative intent. It certainly does not meet the "manifestly erroneous" standard for discretionary review under Rule 23(f).

The PLRA was enacted by Congress in an effort to address the large number of prisoner complaints filed in federal court. *Jones v. Bock*, 549 U.S. 199, 202 (2007). Congress' challenge was to ensure "that the flood of nonmeritorious claims does not submerge and effectively preclude consideration of the allegations with merit." *Jones v. Bock*, 549 U.S. at 202. "What the country needs, Congress decided, is fewer and better prisoner suits." *Id.* at 203.

Congress sought to meet this challenge by enacting a variety of reforms "designed to filter out the bad claims and facilitate consideration of the good." *Id.* at 203-204. One of the "filters" is codified in 42 U.S.C. § 1997e(e). Section 1997e(e) provides that "[n]o civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e).[3]

Petitioners do not dispute that each of the named plaintiffs made the "prior showing of physical injury" required by the PLRA. It is the named plaintiffs who "bring" a class action suit. *See* Fed. R. Civ. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all

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[3] A "prisoner" is defined as "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." 42 U.S.C. § 1997e(h).

members . . . "). The district court's conclusion that the PLRA requirement had been satisfied is in accord with the plain language of the statute. *See* 42 U.S.C. § 1997e(e). The district court's conclusion is also in accord with the legislative intent. It "ensures that the lawsuit is not frivolous, and requiring every member to meet the prior showing of physical injury requirement would not reduce prisoner litigation." Petition, App. A, p. 13a.

There is no conflict among the courts that have addressed the requirement set forth in Section 1997e(e) of the PLRA. *See In re Nassau County Strip Search Cases,* 2010 WL 3781563 (E.D.N.Y.); *Kelsey v. County of Scholharie,* 2007 WL 603406 (N.D.N.Y.), *reversed on other grounds*, 567 F.3d 54 (2d Cir. 2009). In *Kelsey v. County of Scholharie,* the court held that the named plaintiffs were adequate representatives of the class, even though they were not in custody at the time they filed suit, and the PLRA did not apply to them. The court reasoned that "no other potential class members commenced this suit, although they may join the class. The language of § 1997e(e) requires a showing of physical injury in suits brought, i.e. commenced or filed, by prisoners, not those in which they join as members of a class action." *Kelsey v. County of Scholharie,* 2007 WL 603406, at *11. And, in *In re Nassau County Strip Search Cases,* the court held that Section 1997e(e) of the PLRA was inapplicable to individual class members where the named plaintiffs were not incarcerated when the

class action complaint was filed. *In re Nassau County Strip Search Cases,* 2010 WL 3781563, at * 7-8.

Zehner v. Trigg, 952 F.Supp. 1318 (S.D. Ind. 1997), cited by Petitioners, is not on point. In *Zehner,* the court did not address the issue of whether every member of the proposed class or only the named plaintiffs must satisfy the "physical injury" requirement of the PLRA. Rather, the court granted the defendants' motion for judgment on the pleadings because the plaintiffs had "made it clear . . . that they do not seek to prove that *any* class member currently suffers from any physical malady or symptoms caused by the alleged exposure to asbestos." *Zehner,* 952 F.Supp. at 1322 n.2 (emphasis added). The language from *Zehner* quoted by Petitioners is taken out of context. It is from the part of the decision in which the Southern District of Indiana reaches the minority position that the PLRA's requirement that prisoners exhaust administrative remedies applies to former prisoners. *See Rose v. Saginaw County,* 232 F.R.D. 267, 276 (E.D. Mich. 2005).

Turner v. Grant County, 2008 WL 821895 (E.D. Ken. 2008), is equally unhelpful to Petitioners. In *Turner* the court mused that class certification might not be appropriate because PLRA issues would surface if the class were to include present inmates seeking monetary damages under circumstances where physical injury was not evident. *Turner,* 2008 WL 821895 at *20. But the court found no need to engage in a "protracted analysis" of this question because the proposed class failed to satisfy the basic

requirements of Rule 23(b)(3). *Id.* Had the court's "protracted analysis" included a closer look at the plain language of Rule 23(f), it may have ended up where the district court did in this case.

Finally, it is premature to address the question of whether the class members satisfy the physical injury requirement. *See Robinson v. Page,* 170 F.3d 747, 749 (7th Cir. 1999). Petitioners concede that the named plaintiffs made the requisite showing of physical injuries, and Petitioners have not contested the typicality of the named plaintiffs' physical injury claims. The Court should not be misled by Petitioners' sanitized Statement of the Case. There is currently no basis for concluding that there are any class members, let alone a substantial number, who suffered no physical injuries.

The Petition for a Writ of Certiorari should be denied.

IV. THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN DENYING REVIEW OF THE DISTRICT COURT'S FINDING THAT CLASS ISSUES PREDOMINATE OVER INDIVIDUAL ISSUES IN THIS CASE

The Ninth Circuit did not abuse its discretion in denying Petitioners' petition to appeal the case based on the district court's finding that class issues predominate over individual issues. The district court's finding was correct. It certainly does not meet the

"manifestly erroneous" standard for discretionary review under Rule 23(f).

Petitioners' argument that the district court "eliminated" the predominance requirement of Rule 23(b)(3) is nonsense. The district court found that all class members share in common the question, "whether inmates who have been transported for more than 24 hours and who are not allowed to sleep overnight have been deprived of something 'sufficiently serious'" to violate the Eighth and Fourteenth Amendments. Petition, App. A, p. 22a. Sleep has been recognized as a basic human need, the deprivation of which may give rise to an Eighth and Fourteenth Amendment violation. *See Harper v. Showers,* 174 F.3d 716, 720 (9th Cir. 1999) ("sleep undoubtedly counts as one of life's basic needs"); *Thomas v. Baca,* 54 F.Supp.2d 1201, 1216 (C.D. Cal. 2007) ("[A]ccess to a bed is an integral part of the 'adequate shelter' mandated by the Eighth Amendment . . . [P]risons may not deprive those in their care of a basic place to sleep. . . ."). And, while the parties disputed some of TransCor's policies and practices, regarding, for example, how frequently inmates were allowed to use the toilet and how much food and water they were provided with, there was no dispute that TransCor denied all class members sleep in a bed for more than 24 hours.

Petitioners barely mention the facts of this case. Instead, they argue generically that "prisoner conditions of confinement claims are inherently case specific," and that "these types of cases simply cannot

meet Rule 23(b)(3)'s predominance requirement." But the case law does not bear them out. Many civil rights cases challenging system-wide policies or practices have been certified as class actions despite various potential factual distinctions. For example, in *Hagan v. Rogers,* 570 F.3d 146 (3rd Cir. 2009), the court certified a class of prisoners who alleged that they were subject to injury or threat of injury by prison officials' purported deliberate indifference to their exposure to a serious communicable skin disease. The court found that the class satisfied the typicality and commonality requirements for certification even though the class would include prisoners who suffered life-threatening injuries and prisoners who had not yet suffered physical injuries, and treatment would vary among prisoners, since the constitutional harm complained of was typical for and common to all prisoners in the class. *Hagan v. Rogers,* 570 F.3d at 158. And, in *Thomas v. Baca,* 231 F.R.D. 397 (C.D. Cal. 2005), the court certified a class of county jail detainees and former detainees who alleged that their Eighth and Fourteenth Amendment rights had been violated when they were forced to sleep on the floor of the county jails. The court found that the class satisfied the commonality requirement because the central issues for every class member were the fact question of whether they had been required to sleep on the floor and the legal question of whether that fact permitted recovery under Section 1983, while individualized questions were peripheral. *See also Casale v. Kelly,* 257 F.R.D. 396 (S.D.N.Y. 2009) (arrestees satisfied the predominance requirement for

class certification where all shared the legal issue of whether the police commissioner, police department, city, and various police personnel violated their Fourth, Fifth, and Fourteenth Amendment rights by enforcing loitering provisions long deemed unconstitutional); *J.D. v. Nagan,* 255 F.R.D. 406 (E.D. La. 2009) (juvenile detainees satisfied commonality requirement for class certification where all were subjected to the same policies, practices and conditions of confinement, and the same violations of federal and state law constituted the core of each member's claim); *Tyler v. Suffolk County,* 253 F.R.D. 8 (D. Mass. 2008) (state prison inmates and former inmates satisfied the commonality requirement for class certification where all were subject to the same allegedly unlawful policy of restricted access to toilet facilities).

The cases Petitioners cite are inapposite. For the most part, they are either prison condition cases that were not class actions, or class actions that were not prison condition cases. In three of the four that were both, the courts' rulings actually support Respondents' position. *See Johnson v. Lewis*, 217 F.3d 726 (9th Cir. 2000) (court of appeal reversed summary judgment in favor of prison authorities in two consolidated class actions that arose after Arizona prison authorities removed prisoners and placed them in the out-of-doors, exposed to the elements, in response to two separate disturbances inside the prison); *Jorden v. Arnold,* 408 F. Supp. 868 (M.D. Pa. 1976) (district court addressed a variety of prison conditions following certification of a class); *Holt v. Sarver,* 300

F. Supp. 825 (D.C. Ark. 1969) (district court permitted actions challenging conditions at two Arkansas penal facilities to be prosecuted as class actions). The fourth case, *Stewart v. Winter*, 669 F.2d 328 (5th Cir. 1982), is distinguishable. The plaintiffs in *Stewart* attacked the conditions in 82 separate Mississippi county jails. The court of appeals affirmed the denial of class certification because the plaintiffs "ha[d] identified no practice or condition common to all the jails which would allow the district court to maintain the class action 'with respect to particular issues' under Rule 23(c)(4)(A)." *Stewart v. Winter,* 669 F.2d at 336 & n.19.

Respondents have challenged Petitioner Trans-Cor's system-wide policies and practices that deprive inmates of rest in a bed for more than 24 hours. "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." Wright, Miller & Kan, 7AA *Federal Practice and Procedure*, § 1778. This is precisely the kind of case where class certification is justified.

The Petition for a Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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